FARLIM PROPERTIES SDN BHD

v.

TOH CHENG HOCK & ORS

HIGH COURT MALAYA, PENANG
RK NATHAN J
[ORIGINATING SUMMONS NO: 24-1084-2001]
19 DECEMBER 2001

LAND LAW: *Restraint on dealings - Caveats - Application for order to keep caveat intact pending hearing of appeal - Whether should be granted - Chor Phaik Har v. Farlim Properties Sdn Bhd - Whether plaintiff an "aggrieved person" under s. 327 National Land Code*

CIVIL PROCEDURE: *Execution - Stay - Application for stay of execution of orally pronounced order pending appeal to Court of Appeal - Whether should be granted*

Pursuant to two agreements for the purchase of some lands, the plaintiff had filed in High Court civil suit no. 22-307-97 against the beneficiaries of the lands in question and the 2nd defendant herein seeking, *inter alia* specific performance of the said agreements. On the application of the 2nd defendant, the High Court struck off the plaintiff's statement of claim based on the Federal Court's decision in *Chor Phaik Har v. Farlim Properties Sdn. Bhd.* The plaintiff appealed to the Court of Appeal against that striking off and this was the plaintiff's application in encl. 20 before this court to obtain an order to keep the plaintiff's caveat intact on the said lands pending the disposal of the appeal by the Court of Appeal.

Held:

[1] This court was bound by the decision of the Federal Court in *Chor Phaik Har* which held that the plaintiff herein is not an "aggrieved person" under s. 327 of the National Land Code. This court therefore could not give any order to entitle the plaintiff to keep intact the caveat until hearing of the appeal. Hence, the court delivered an oral decision dismissing the plaintiff's application (the "said order").
(p 464 d)

[1a] However, upon oral application from the plaintiff for a stay of the said order pending an appeal to the Court of Appeal against the said order; the plaintiff was granted stay of the said order until 2 December 2001

to enable the plaintiff to file its appeal to the Court of Appeal. Having heard no request from the plaintiff for any further extension of the caveat, the said order remained as ordered. (pp 464 e & 465 d, g-h)

[Ordered accordingly.]

Case(s) referred to:
Chor Phaik Har v. Farlim Properties Sdn Bhd [1997] 4 CLJ 393
Hing Kim Pong v. Teo Eng Jin [1980] 1 MLJ 43
Tan Soo Bing & Ors v. Tan Koi Fook [1997] 1 CLJ 556
Tee Chin Yong v. Ernest Jeff [1963] MLJ 118

Legislation referred to:
National Land Code, ss. 326(1), 327, 417
National Land Code (Amendment) Act 1982, s. 2(c)
National Land Code (Amendment) Act 1984, s. 93
Sarawak Land Code, s. 177

Other source(s) referred to:
Judith Sihombing, *National Land Code*, edn 2000, p 607

For the plaintiff - Dato' Mahinder Singh Dulku (VM Mohan); M/s Mahinder Singh & Co
For the defendants - K Kirubakaran (Joseph Yeoh & Ramanathan); M/s Ram Pillai & Assoc

Reported by Raja Vishnu Sivarajah

JUDGMENT

RK Nathan J:

Facts

By two sale and purchase agreements dated 23 Januay 1992 entered into between Choong Lye Hock Estates Sdn Bhd and some of the beneficiaries of the Estate of Chor Bah Say @ Chor Bar Say deceased (the vendors) on the one part and the plaintiff on the other part the vendors agreed to sell to the plaintiff as purchasers their respective undivided shares equivalent to 48/56 undivided shares of the said lands held under grant and described in the schedule to the request for an entry of a private caveat. The plaintiff had in the meantime made certain payments to the vendors pursuant to the terms of the said agreements. However two of the beneficiaries of the estate of Chor Bah Say @ Chor Bar Say deceased did not execute the sale and purchase agreements. In the meantime some of the other beneficiaries had sold what amounts to an equivalent of 30/56 undivided shares of the said land held under grant and also included in the schedule to the request for an entry of a private caveat to the 2nd defendant herein.

The plaintiff filed Penang High Court Civil Suit No. 22-307-97 against the beneficiaries of the estate of Chor Bah Say @ Chor Bar Say deceased and the 2nd defendant herein seeking *inter alia* specific performance of the two sale and purchase agreements dated 23 January 1992. In a related case one of the beneficiaries and a party to the sale and purchase agreements refused to execute the said two agreements and entered a caveat against the said lands. The respondent in that case, who was also the plaintiff in this case applied to the High Court to remove the caveat. The High Court allowed the application and ruled that the respondent was an aggrieved person within the meaning of s. 327 of the National Land Code (NLC). On appeal, the Federal Court held that since at the date of the execution of the sale agreements the administration of the deceased's estate had not been completed, the beneficiaries had no interest or property in the deceased's estate so as to give them any title to the land and that therefore the beneficiaries could not have covenated to convey any title to the plaintiff herein under the sale agreements and that in the circumstances the plaintiff could not rely on those agreements to justify its status as a 'person aggrieved' under s. 327 of the NLC and the Federal Court went on to hold that there were no sufficient grounds in law or fact to treat the plaintiff herein as a person having an interest in the lands in question. (See *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 4 CLJ 393 FC)

Subsequently on 19 May 1995 the beneficiaries had obtained a distribution order. The defendants in Civil Suit No. 22-307-97 applied to strike off the caveat based on the decision of the Federal Court. The High Court struck off the statement of claim based on the decision of the Federal Court. The appeal against that decision to the Court of Appeal is still pending. The plaintiff then entered a caveat in respect of the 48/56 shares of the said lands owned by the beneficiaries and the 2nd defendant.

The Form Used

On being notified of the caveat the 2nd defendant applied by way of Form 9 of the forms used in the NLC requiring the Registrar of Land Titles, Penang to remove the plaintiff's caveat. The plaintiff then filed this originating summons to keep the caveat valid and extended and to remain on the register until the disposal of the appeal to the Court of Appeal earlier referred to. Dato' Mahinder Singh, for the plaintiff, argued that Form 9 was not the correct form to have been used. Since the caveat was sought to be removed pursuant to s. 326(1) of the NLC the proper form that ought to have been used was Form 19H and not the old Form 9 since the said section specifically referred to Form 19H. Section 326 of the NLC was amended by Section 93 of the National Land Code (Amendment) Act 1984 (Act A587) which reads as follows:

(1) Any person or body whose land or interest is bound by a private caveat may at any time apply in Form 9 to the Registrar for its removal, and such application shall be accompanied by the prescribed fee.

1A) On receiving any application for removal under this section, the Registrar shall:

(a) serve upon the person or body at whose instance the caveat was entered a notice of intended removal in Form 19C; and

(b) subject to sub-section (2), remove the caveat at the expiry of the period of one month specified in that notice.

This Act no doubt refers to the use of form 9. Then this section was again amended by the National Land Code (Amendment) Act 1992 (Act A832): Section 2(c) of the amended Act reads as follows:

(c) dengan menomborkan semula borang-borang yang dinyatakan dalam ruang pertama di bawah ini, dan rujukan-rujukan kepadanya di seluruh kanun, mengikut nombor-nombor yang dinyatakan dalam ruang kedua:

Ruang Pertama	**Ruang Kedua**
Borang 1A	Borang 2B
Borang 4AA	Borang 4B
Borang 13C	Borang 14D
Borang 3	Borang 7C
Borang 4	Borang 7D
Borang 5	Borang 7E
Borang 6	Borang 7F
Borang 7	Borang 19F
Borang 8	Borang 19G
Borang 9	Borang 19H

Dato' Mahinder thus argued that since Form 9 had been abolished the 2nd defendant ought therefore to have used Form 19H and not Form 9. To a querry from the court Dato' Mahinder with his usual candour agreed that there were no dissimilarities between the two forms and very fairly conceded that the forms were given different numbers in order to regulate them. I have perused both the forms and agree with Dato' Mahinder that there are no differences between the forms. I therefore find that the use of Form 9 instead of Form 19H is not fatal to the 2nd defendant's cause.

Dato' Mahinder also argued that the 2nd defendant had not in fact deleted the relevant terms specified in Form 9 for example proprietor/lessee/sublessee/ chargee whose land/interest is bound by private caveat volume number. The plaintiff submitted that the inapproriate designation ought to have been deleted.

Again I am of the view that this non-deletion is not at all fatal. The statutory declaration of the general manager of the plaintiff in support of the caveat sets out the identity of the parties and to my mind there is no confusion caused to the plaintiff by the non-deletion. In fact in land commentary to the *National Land Code* Edn 2000, Judith Sihombing has this to say at p. 607 in respect of s. 326(1) of the NLC:

> Application for removal of a private caveat can be made in Form 9, under this subsection, by a person whose title or interest is affected by the presence of the caveat. Although the subsection has been amended to provide for a statutory form of application, it would seem that the use of the form is not mandatory and that the applicant can apply in writing in whatever form he wishes.

Another issue taken up by Dato' Mahinder relates to the defendants stating in Form 9 under the Column "Bahagian Tanah (Jika Ada) the word "kesemua". The plaintiff argued that since the 2nd defendant claimed entitlement to only 30/56 of the 48/56 shares in the said lands, the 2nd defendant ought not to have stated "kesemua" and that it ought to have stated "30/56 sahaja".

Again to my mind this submission is untenable. The plaintiff itself had not identified in the caveat what constitutes the 30/56 shares belonging to the 2nd defendant that it had caveated. Neither Form 19B (the request for entry of a private caveat) nor the accompanying statutory declaration nor the schedule has identified the defendants' shares of 30/56. The plaintiff entered one caveat in respect of the entire 48/56 shares which also includes the 30/56 shares owned by the 2nd defendant. There is no way that the 2nd defendant could ask the registrar of titles to split the caveat and to stipulate this request in its Form 9. Strictly speaking the 2nd defendant must apply to remove the entire caveat. In *Tee Chin Yong v. Ernest Jeff* [1963] MLJ 118, Ismail Khan J very aptly described this situation at p. 119 when he said:

> I do not think that a caveat is divisible in the same way that certain clauses in a contract may in proper circumstances be severable from the rest. Therefore, if the caveats lodged by the plaintiff were partially invalid such invalidity renders those caveats wholly null and void and of no effect.

In any case clearly it is the fault of the plaintiff in not caveating the 2nd defendant's shares specifically. Since the plaintiff knew the exact pieces of land that represent the 2nd defendant's 30/56 shares, the plaintiff ought to have entered a caveat only in respect of the 2nd defendant's 30/56 shares.

Caveatable Interest

It was the case of the plaintiff that its caveatable interest arose as a result of the two sale and purchase agreements entered into between some beneficiaries

and the plaintiff. But this very same issue was put to rest by the Federal Court in *Chor Phaik Har (supra)*. In the circumstances since the Federal Court had already ruled that since administration of the deceased's estate had not been completed when the two sale and purchase agreements were executed by the beneficiaries and that in law the beneficiaries had no interest or property in the deceased's estate so as to give them any title to the land which would have authorised them to convey any title to the plaintiff herein, I would, based on that same conclusion hold that the plaintiff herein is not an aggrieved person within the meaning of s. 327 of the NLC. Coming back to the Penang High Court CS 22-307-97 the same was struck out on the application of the 2nd defendant based on the decision of the Federal Court in *Chor Phaik Har (supra)*. The plaintiff has appealed to the Court of Appeal against that striking off and this application before me is to obtain an order to keep the caveat intact on the said lands pending the disposal of the appeal by the Court of Appeal. To my mind the decision of the Federal Court is explicit. I am bound by that decision which has held that the plaintiff herein is not an aggrieved person under s. 327 of the NLC. I cannot therefore give any order to entitle the plaintiff to keep intact the caveat until hearing of the appeal. On this ground too I had no hesitation in dismissing the plaintiff's application (encl. 20) with costs.

After I had delivered my oral decision dismissing the plaintiff's application (encl. 20) with costs Dato' Mahinder immediately rose and asked "for a stay of the order pending an appeal to the Court of Appeal against this order" and he undertook to file the appeal within two to three days thereafter on a certificate of urgency. Kirubakaran for the 2nd defendant objected and both parties asked for the matter to be stood down to 2.15pm to enable them to submit satisfactorily on this issue with authorities. When court resumed Kirubakaran referred to *Hing Kim Pong v. Teo Eng Jin* [1980] 1 MLJ 43. In that case the respondent was the registered proprietor of certain lands. The appellant claiming a beneficial interest in part of the land caveated, successfully obtained an order under s. 177 of the Sarawak Land Code to remove the caveat. Having appealed against that decision the appellant applied for a stay of execution which was refused. He appealed against the refusal for a stay and in dismissing the appeal Lee Hun Hoe CJ (Borneo) (as his Lordship then was) said at p. 44 as follows:

> It must be remembered the application in this case is concerned with section 177 of the Land Code which not only provides a summary procedure for removal of caveat but also a way for speedy determination by the court. The question of proprietary right is involved. The lodgment of the caveat amounts to a deprivation of such right. If the learned judge deemed fit to remove the caveat then grant of stay of execution ought not to be allowed as it affects proprietary right.

Dato' Mahinder however referred me to *Tan Soo Bing & Ors v. Tan Koi Fook* [1997] 1 CLJ 556. In that case the Federal Court was called upon to decide two issues namely (1) whether the High Court had the power or jurisdiction to direct the registrar or any land administrator to enter a registrar's caveat in respect of any land and (ii) whether the court should preserve *status quo* by allowing the registrar's caveat to remain pending the final hearing of the suit, on the basis that the applicants would probably transfer the subdivided lots to *bona fide* purchasers, thereby causing irreparable damage to the plaintiff/respondent when the caveat was removed. The court concluded that it was *ultra vires* the powers conferred upon the registrar under s. 417 of the Code to have entered the caveat. However, in order that justice be served, it was necessary that the *status quo* should be maintained till all the disputes among the parties were resolved. Therefore, the court directed that the order made be stayed for eight weeks to give the plaintiff/respondent time to file an appropriate claim against the appellants in connection with the subdivided lots and to apply for an interlocutory injunction to restrain the appellants from disposing the said lots till the disposal of the claim. It is unfortunate that the earlier decision of the Federal Court in *Hung Kim Pong* was not referred to the court hearing *Tan Loo Bing*. In the circumstances I granted the plaintiff a stay of my order until 2 December 2001 to enable the plaintiff to file its appeal to the Court of Appeal.

But the saga did not end there. The plaintiff in drafting my order granted on 28 November 2001 included in that order a provision that the court had also extended the caveat up to that date. The defendant of course deleted that provision. The plaintiff's solicitors then sought leave to appear before me to clarify my order on a certificate of urgency. On 4 December 2001 VM Mohan appearing for the plaintiff sought this court's clarification on the order made on 28 November 2001. His question was "When the court made the order was the caveat also extended subject to the plaintiff filing the notice of appeal". Having perused my notes and recalling the events that occured just a few days ago I informed Mohan that whilst I had on 31 October 2001 extended the caveat up to 28 November 2001, there was no request from the plaintiff's solicitors for any further extension of the caveat. All that this court was asked for was a stay of execution of the order which I granted up to filing the notice of appeal. I therefore declared that my order made on 28 November 2001 remained as ordered and that there was no clarification needed as I was not at all addressed on the issue of the extension of the caveat.